Supreme Court, U.S.
FILED
OCT 29 2002
OFFICE OF THE CLERK

No. 02-165

IN THE

Supreme Court of the United States

RICHARD A. BORGNER AND
THE AMERICAN ACADEMY OF IMPLANT DENTISTRY,

Petitioners,

v.

THE FLORIDA BOARD OF DENTISTRY
AND JOHN O. AGWUNOBI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In their brief in opposition, respondents opt for silence rather than speech in addressing many of the issues raised by the petition. They do not deny that the Court has had few, if any, opportunities to clarify the appropriate standard for reviewing government-compelled and government-scripted speech disclaimers. They do not deny that only the most eccentric commercial speaker would be willing to include the disclaimer required in this case, one that forces dentists to say that their educational credentials come from organizations that are "not . . . bona fide." They do not deny that Florida dentists in fact have been unwilling to communicate with consumers about their educational credentials and expertise on these terms. They do not deny that this requirement is not only burdensome but also misleading—because one of the respondents, the Florida Board of Dentistry, previously found that "the AAID and the ABOI/ID are bona fide organizations." Pet. App. 48a (quotation omitted). And they do not deny the glaring reality that the Florida Attorney General has in the words of the district court "declin[ed]" to defend them in this case. *See* Pet. App. 26a n.1.

What respondents do say in answering the petition is no more helpful to their cause. For these reasons, those offered in the petition, and those added below, the writ should be granted.

1. Respondents initially make a fainthearted attempt to contest the severity of the disclaimer requirement. In their rephrasing of the question presented and on the first page of their brief, they submit (Br. i, 1) that the Florida law merely imposes "a *modest* disclaimer" requirement on dentists like Dr. Borgner. (Emphasis added.) No explanation has been given for this characterization of the law, and none would seem to exist. What individual would be willing to publicize affiliation with an organization that must be characterized as "not . . . bona fide"? And who would do so when the disclaimer must appear in capital letters (or their equivalent)? To our knowledge, no dentist has been willing to pay such a

steep price to tell the public about their educational qualifications and expertise. And so long as the point of advertising is to increase rather than diminish one's customer base, it is difficult to envision any commercial speaker who ever would communicate with the public on these terms. If this is "modesty," in short, one can only imagine the Florida Board of Dentistry's view of extravagance.

2. Respondents next devote a considerable number of words (Br. 4; *see id.* 4-10) to arguing that the Court often has stated a preference for "requiring . . . disclosure in advertising, rather than speech suppression." Yet this argument does not contradict the petition; it echoes one of the essential points made in it. Yes, as the petition explains (Pet. 14-17), the Court frequently has acknowledged the First Amendment's preference for more information rather than less. But the point of detailing the Court's decisions on this issue was to explain that they do not establish the necessary predicate for two components of the lower-court analysis—(1) that all commercial-speech disclosure requirements are presumptively constitutional and (2) that general information-based disclosure requirements warrant the same kind of constitutional scrutiny as state-scripted disclaimer requirements that diminish credibility rather than explain a product's attributes. Indeed, one of the central premises of the petition is that the Court's frequently-stated *dicta* that more speech is preferable to less speech has caused lower courts to give unduly lax scrutiny to disclaimer requirements.

And that is exactly what happened here. So forgiving was the Eleventh Circuit's application of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), that the court upheld a disclaimer requirement that in application operates no differently from a law establishing content-based speech suppression about dentists' educational credentials and about their expertise. Consider just two examples of the lower court's thinking on this point, both of

them quoted in full (Br. 3-4) in respondents' brief in opposition. In one, the court said:

> Disclaimers are significantly different than outright bans on commercial speech; they are not as broad and less likely to be disproportionate to the ends the government seeks. Courts have been more tolerant of regulations mandating disclosure requirements than they have been of regulations that impose a total an on commercial speech.

Pet. App. 14a. In the other, the court suggested that the Florida disclaimer at issue here is "not . . . especially long or burdensome, but simply an effective manner to convey necessary information to the public." Pet. App. 17a.

In the first and final analysis, these statements do not accord with reality. By any measure, Florida's disclaimer requirement has operated as a speech ban—as every indicator of common sense would expect and as all experience under the law has proved. When the repetition of Court *dicta* that speech disclosure is preferable to speech suppression leads to the upholding of a law that operates to silence commercial speech on the basis of its content, the question that arises is not simply one of lower court error. It is also whether the appropriate test for reviewing speech disclosure requirements is being used and whether that test has become too vulnerable to the type of interest-group capture that apparently occurred here. As the facts of this case well illustrate, in other words, the lower court's conversion of *dicta* about speech disclosure into an iron-clad presumption of constitutionality presents additional reasons to review the Florida law, not a reason to allow it to remain on the books.

3. Matters do not improve when respondents turn (Br. 7-8) to *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985)—the one holding of the Court that sustains a disclosure requirement. In that case, the record established that contingency-fee advertisements left the impression that the client would not have to pay *any* money

(including costs) for the offered legal services. *Id.* at 652-53. In response, Ohio required attorneys advertising such fee arrangements to explain more fully how they worked. Unlike Florida, however, Ohio did not script a disclaimer; it did not require the disclaimer to appear in capital letters; and it did not require the attorney to stress to potential clients that the fee arrangement was "not . . . bona fide."

Properly read, *Zauderer* illustrates when a disclosure is both warranted and valid. As shown in the petition (25-26), the key problem with the *Zauderer* contingency-fee advertisements was that they were misleading as written. In that setting, commercial speech receives no First Amendment protection, *Central Hudson*, 447 U.S. at 566, and a disclosure requirement accordingly ought to receive a heavy, if not an irrebuttable, presumption of constitutionality. That lesson, however, has no application to truthful speech about a legitimate and established organization, which is the only kind of speech Dr. Borgner asked to communicate to consumers here.

4. In addition to failing to explain why *Zauderer* supports the validity of a disclaimer requirement imposed with respect to truthful, non-misleading speech, respondents fail to explain how the Eleventh Circuit's decision is consistent with *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), and *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994). To be sure, respondents briefly discuss (Br. 8-10) both decisions. But they nowhere explain how the Eleventh Circuit's diluted scrutiny of the Florida disclaimer adheres to the analysis of those two cases or to the results in them. Indeed, if the approach of *Peel* or *Ibanez* were employed here, any risk of confusion could be removed by the consumer's ability to "verify [Borgner's] credential"—either by calling AAID or by asking Dr. Borgner himself. *Ibanez*, 512 U.S. at 145 n.9. If that lesser alternative sufficed in *Ibanez* and *Peel*, both of

which did not involve a "not . . . bona fide" disclaimer requirement, it surely ought to suffice here.

5. Nor do respondents explain how the record evidence in this case satisfies even the most modest version of *Central Hudson* scrutiny. In particular, no evidence supports the notion that consumers need a "not . . . bona fide" disclaimer to avoid being misled by a dentist who advertises that he has been credentialed by AAID. Not only has Florida failed to "point to any harm that is potentially real, not purely hypothetical" with respect to the need for this onerous requirement, *Ibanez*, 512 U.S. at 146, but it also is difficult to imagine how such evidence ever could be compiled. *Cf. Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (evidentiary burden "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree") (quotation omitted).

That is particularly true in this instance. The record already establishes that the same agency that is implementing this law—respondent, the Florida Board of Dentistry—previously concluded that "the AAID and the ABOI/ID are bona fide organizations." Pet. App. 48a (quotation omitted). And the district court previously reached the same conclusion. *See* Pet. 4 (citing *Borgner v. Cook*, 33 F. Supp. 2d 1327, 1333 (N.D. Fla. 1998) (*Borgner I*)). First Amendment challenges rarely come to the Court pre-packaged with such evidence, which in this instance is as pertinent as it is uncontradicted.

6. Respondents do not answer Dr. Borgner's argument (Pet. 12-14) that the 2-1 decision of the Eleventh Circuit not only is inconsistent with *Central Hudson* but also fails to respect other free-speech first principles. In engrafting onto the First Amendment a casual standard of review for government-compelled and government-scripted speech disclaimers, the lower court lost sight of the language of the

amendment and of other decisions interpreting it. As a matter of constitutional language, the First Amendment protects a citizen's "freedom of speech," a phrase that necessarily covers "both what to say and what not to say." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797 (1988). And as a matter of precedent, the Court frequently has given exacting scrutiny to compelled-speech requirements because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Id.* at 795. *See also* Pet. 13-14 (citing other cases). Respondents offer no explanation how the lower-court's decision respects these time-honored principles or can be reconciled with them.

7. Respondents also do not respond to the two brief *amici curiae* offered in support of the petition, both of which were filed long before respondents submitted their brief in opposition. As to the brief of The American Academy of Cosmetic Dentistry, respondents do not counter these contentions: (1) the Florida law "harms consumers because, as a practical matter, it puts an end to the certification of dentists in Florida by non-state sanctioned organizations," Br. 2; (2) the injury to consumers "is accomplished by a *de facto* ban on certain kinds of speech," *id.*; (3) "[w]ithout . . . guidance" from the Court, decisions like the Eleventh Circuit's "put at risk the ability of legitimate organizations . . . to award professional credentials," *id.* at 3; and (4) laws like this one "harm[] consumers" by "rais[ing] their search costs and . . . reduc[ing] the investments professionals will make to acquire expertise," *id.* at 6. As to the brief by The American Board of Implantology/Implant Dentistry, respondents do not counter these contentions: (1) the Florida surveys relied on by the Eleventh Circuit did not ask the most pertinent questions raised by this law—namely, consumers' "perceptions of the scripted disclaimer" or whether a "less burdensome approach than having a dentist state that his or her certification was not BONA FIDE might satisfy the State of Florida's concerns,"

Br. 8.; and (2) the time has come to resolve this issue—as the State of Florida "has prohibited ABOI/ID diplomates from communicating their qualifications to the public since 1996," Br. 10.

8. Nor do respondents argue or even suggest that this case presents a poor vehicle for reviewing the issue. At no point, for instance, do respondents raise a jurisdictional impediment to reviewing the question presented. A final, appealable order is in place, and there is no independent and adequate state ground precluding review. Nor have respondents claimed that any arguments made by the petitioners have been waived. And the absence of a circuit split, say, of the type one would find in a statutory-interpretation case, is of no moment. It would be quite unusual to find two States with the same disclaimer scheme. So too would it be unusual to see a lower court assess a disclaimer statute without reference to *Central Hudson*. The unalterable reality is that this Court has not yet enjoyed the opportunity to explicate fully the standards governing these kinds of disclaimers. In the end, whether one supports the *Central Hudson* test or disapproves of it, lower courts and litigants alike need guidance from this Court regarding the appropriate standard for assessing government-compelled and government-scripted disclaimers in the commercial-speech arena. This case presents an ideal vehicle for doing so.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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